



Reproductive and Sexual Health Law Supplement

Joanna Erdman
Faculty of Law, University of Toronto

Fall 2007

These materials have been prepared exclusively for the use of students of the Faculty of Law, University of Toronto

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Reproductive and Sexual Health Law 2007 Supplement

Joanna Erdman Faculty of Law, University of Toronto

This course addresses national and international legal protection and promotion of reproductive and sexual health. It examines the comprehensive nature of reproductive health, including fertility control and promotion, treatment of sexually transmitted diseases, such as HIV/AIDS, and abusive sexual relations. The course provides introductory overviews of the background law and its interaction with ethical principles. The course surveys different disciplinary dimensions, such as biomedical, epidemiological and social science perspectives that can be used in the development and application of reproductive and sexual laws. It analyzes the effectiveness of the law in protecting groups at high risk of reproductive health disadvantages, such as adolescents.

Texts:

Cook RJ, Dickens BM and Fathalla MF. Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law. Oxford: Oxford University Press, 2003.

Updates available at: http://www.law.utoronto.ca/faculty/cook/ReproductiveHealth.html

2007 Supplement

Structure:

Part 1: Context & Methodology (September 5, 12, 19)

Part 2: Legal Regulation of Reproductive & Sexual Health (September 26, October 3)

Part 3: Health Systems under the Right to Health (October 10, 17)

Part 4: Equality & Non-Discrimination (October 24, 31)

Part 5: Dignity, Bodily Integrity and Liberty (November 14, 21 and 28)

Part 6: Moral, Professional and Legal Duties (December 5)

Evaluation:

All students must complete <u>three</u> short assignments (3 pages), each commenting on a reading from a different Part of the course (15%). Short assignments are due by 12:00pm on the Tuesday before class. The balance of the evaluation (85%) is based on:

- a research paper or legal memorandum (approximately 20 pages). Paper outlines are due by October 17, 2007. Comments will be returned by October 31. OR
- a 48 hour take-home examination (100%) to be signed out from and returned to the Records Office. The examination may be taken during any 48 hour period between the first day of the examination period and due no later than the set deadline for written work for the term (see Take-home Policy in the Syllabus for details).

OVERVIEW

PART 1: CONTEXT & METHODOLOGY

- 1. Introduction & Course Overview (September 5)
- 2. Reproductive & Sexual Law in Context (September 12)
- 3. Perspectives in Reproductive & Sexual Health Law (September 19)

PART 2: LEGAL REGULATION OF REPRODUCTIVE & SEXUAL HEALTH

- 4. Service Delivery (September 26)
- 5. Acceptable Care & Criminal Regulation (October 3)

PART 3: HEALTH SYSTEMS UNDER THE RIGHT TO HEALTH

- 6. Legal Institutions & Public Funding for Health Services (October 10)
- 7. Service Accessibility (October 17)

PART 4: EQUALITY & NON-DISCRIMINATION

- 8. Stereotyping as Discrimination: Sex/Gender (October 24)
- 9. Stigmatization as Discrimination: Health Status (October 31)
- * Reading Week *

PART 5: DIGNITY, BODILY INTEGRITY & LIBERTY

- 10. Bodily Integrity: Sterilization (November 14)
- 11. Torture & Other Inhuman & Degrading Treatment: Forced Pregnancy & Intimate Body Searches (November 21)
- 12. Sexual Violence, Vulnerability & Empowerment (November 28)

PART 6: MORAL, PROFESSIONAL & LEGAL DUTIES

13. The Right to Life & Conscientious Objection (December 5)

PART 1: CONTEXT AND METHODOLOGY

1. Introduction & Course Overview (September 5)

The texts for the course are:

R.J. Cook, B.M. Dickens & M.F. Fathalla. Reproductive Health and Human Rights: Integrating Medicine, Ethics and Law. Oxford: Oxford University Press, 2003 (Green Book, GB).

Updates: http://www.law.utoronto.ca/faculty/cook/ReproductiveHealth.html

2007 Supplement

2. Reproductive & Sexual Health Law in Context (September 12)

Green Book: 8-33, 95-107, 154-156.

GB

D. Maine et al. "Risk, Reproduction and Rights: The Uses of Reproductive Health Data" in R. Cassen (ed.) *Population and Development: Old Debates, New Conclusions* (Washington: Overseas Development Council, 1994), pp. 203-227.

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See also:

- L.P. Freedman & S.L. Isaacs. "Human Rights and Reproductive Choice." (1993) 24(1) *Studies in Family Planning* 18-30.
- S. Correa. *Population and Reproductive Rights: Feminist Perspectives from the South.* (London: Zed Books Ltd, 1994).
- R. Petchesky & Karen Judd (eds.) *Negotiating Reproductive Rights: Women's Perspectives Across Countries and Cultures.* (New York: Zed Books, 1998).
- J. Cottingham & C. Myntti. "Reproductive Health: Conceptual Mapping and Evidence" in G. Sen, A. George & P. Ostlin (eds.) *Engendering International Health*. (Cambridge: MIT Press, 2002).

3. Perspectives in Reproductive & Sexual Health Law (September 19)

A. Critical and Feminist Perspectives on Sex & Gender

Green Book: 14-18.

G.W. Dowsett. "Some considerations on sexuality and gender in the context of AIDS." (2003) 11(22) Reproductive Health Matters 21-29.

500	also	
DEE	uiso	

- E. Annandale & J. Clark. "What is gender? Feminist theory and the sociology of human reproduction" (1996) 18(1) *Sociology of Health and Illness* 17-44.
- J. Archer & B. Lloyd. Sex and Gender (Cambridge: Cambridge University Press, 2002).

B. Development Perspectives

S. Bernstein & C.J. Hansen. Public Choices, Private Decisions: Sexual and Reproductive Health and the Millennium Development Goals. (New York: UNDP, 2006).

See also:

L. Freedman et al. Who's got the power? Transforming health systems for women and children. Task Force on Child Health and Maternal Health (New York: UN Millenium Project, 2005).

Reproductive Health & the MDGs: See Special Issues of *Family Planning Perspectives* 36.1 and 36.2 (March and June 2005)

C. Economic (Cost-Based) Perspectives

Green Book: 42-43 (Inefficiency in the Heath Care System), 53-58 (Question of Resources).

Vlassoff M et al. "Broader Approach to Measuring Benefits and Costs" 29

Assessing Costs and Benefits of Sexual and Reproductive Health

Interventions (New York: AGI, 2004) pp. 53-60.

D. Human Rights Perspectives

Green Book: 90-92, 148-158, 217-252 (HR Needs Assessment). GB

E. Public Health Perspectives

J. Cohen, N. Kass & C. Beyrer, "Responding to the Global HIV/AIDS Pandemic: Perspectives from Human Rights and Public Health Ethics" in C. Beyrer and H.F. Pizer (eds.) *Public Health and Human Rights: Evidence-Based Approaches.* (Baltimore: JHU Press, 2007) (excerpts).

PART 2: LEGAL REGULATION OF REPRODUCTIVE & SEXUAL HEALTH

	4.	Service	Delivery	(Sei	ptember	26)
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A. General Principles	A.	General	Prin	ciples
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Green Book: 128-135 (Competent Delivery of Services), 49-51 (Health	GB
Care Systems and the Law).	

B. Duty of Care: Condoms in Prisons

- "United Kingdom: Provision of condoms to prisoners" Courting Rights: 48
 Case Studies in Litigating the Human Rights of People Living with HIV.
 106-108 (Geneva: Can HIV/AIDS Legal Network & UNAIDS, 2006).
- R. v. Secretary of State for the Home Department ex parte Glen Fielding [1999] EWHC Admin 641 (High Court of Justice, Queen's Bench).

See also:

Prisoners A-XX Inclusive v. State of New South Wales (1995) 38 NSWLR 622.

C. Delegated Authority and Health Providers: Emergency Contraception & Abortion

- Royal College of Nursing of the UK v. Department of Health and Social 55 Security [1981] 1 All ER 545 (House of Lords).
- R.J. Cook, B.M. Dickens & J.N. Erdman, "Emergency contraception, abortion and evidence-based law" (2006) 93 *Int. J. Gynecol. Obstet.* 191-197, pp. 191-194 only.
- Smeaton v Secretary of State for Health, [2002] EWHC 610 (Admin) 67 (excerpts).

See also:

J.N. Erdman & R.J. Cook. "Protecting Fairness in Women's Health: The Case of Emergency Contraception" in C.M. Flood (ed.) *Just Medicare:* What's In, What's Out, How We Decide (Toronto: University of Toronto Press, 2006) 137-167.

5. Acceptable Care: Adolescent Access to Abortion (October 3)

- Green Book: 109-118 (Decision-Making), 203-205 (Age Discrimination), GB 276-86 (Case Study).
- C. v. Wren, [1986] A.J. No. 1166 (Alberta Court of Appeal).

	R. (on the application of Axon) v. Secretary of State for Health & Another [2006] E.W.H.C. 37 (Admin).	85
See also:	R.J. Cook, J.N. Erdman & B.M. Dickens. "Respecting adolescents' confidentiality and reproductive and sexual choices." (2007) 98(2) Int J Gynaecol Obstet. 182-187.	
	Christian Lawyers Association of South Africa and Others v. Minister of Health and Others, [2005] (1) SA 509 (T) (High Court of South Africa).	
	Gillick v. West Norfolk and Wisbech Area Health Authority, [1986] Appeal Cases 112 (House of Lords).	
	Carey v. Population Services International, 431 U.S. 678 (1977).	
5. Crimina	al Regulation (October 3)	
A. Genera	al	
	Green Book: 144-47, 164-165 (Criminal Law & Unsafe Abortion).	GB
B. HIV/A	IDS	
	L. Gostin. The AIDS Pandemic: Complacency, Injustice and Unfulfilled Expectations (Chapel Hill: University of North Carolina Press, 2004), pp. 186-187, 195-198.	97
	M. Weait, "Criminal Law and the Sexual Transmission of HIV: R. v. Dica" (2005) 68 Modern Law Review 121–139 A Comment on: R. v. Dica [2004] EWCA Crim1103.	100
	Contrast R v. Cuerrier (1998) 127 C.C.C. (3d) 1 (S.C.C.). with R v. Cuerrier (1996) 141 D.L.R. (4th) 503 (British Columbia).	114
	R. v. Konzani [2005] EWCA Crim 706.	127
See also:		
	R v. Williams [2003] 2 S.C.R. 134.	
	I. Wolffers & N. van Beelen. "Public health and the human rights of sex workers" (2003) 361 <i>The Lancet</i> 1981.	
	Canadian HIV/AIDS Legal Network. Sex, Work, Rights: Reforming Canadian Criminal Laws on Prostitution. (Toronto: 2005)	

PART 3: HEALTH SYSTEMS UNDER THE RIGHT TO HEALTH

6. Legal Institutions & Public Funding for Health Services (October 10)

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4	General	
	VIEHEIMI	

- Green Book: 34-40, Review 53-58 (The Question of Resources), 187-194 GB (Right to Health), 477-499 (CESCR General Comment 14).
- R.J. Cook, "Exploring Fairness in Health Care Reform" (2004) 29(3)

 Journal for Juridical Science 1-27 (excerpts).
- K.J. Syrett, "Revisiting the Judicial Role in the Allocation of Healthcare Resources: On Deference, Democratic Dialogue and Deliberation" (2005) 30(2) *Journal for Juridical Science* 1-29.

B. HIV/AIDS Treatment

- Green Book: 162-164 (anti-retroviral and associated treatment) GB
- Minister of Health and others v Treatment Action Campaign [2002] 5 S. Afr. L. R. 721 (South African Constitutional Court).

See also:

Tutela No. T-505/92, Right of Sick Person/AIDS Patients, Constitutional Court of Colombia, Judgment No. T-505/92 (1992).

Cruz del Valle Bermudez et al. v. Ministry of Health and Social Action, SC of Venezuela, Decision No. 916, Court File No. 15.789 (1999)

Lopez et al. V. Instituto Venezolano de Seguros Sociales, Supreme Court of Venezuela, Judgement No. 487-060401 (6 April 2001).

C. Discrimination in Public Funding: Sex Reassignment Surgery

Hogan v. Ontario (Minister of Health and Long-Term Care), [2006] HRTO 32 (excerpts)

See also:

Waters v. British Columbia (Ministry of Health Services) 2003 BCHRT 13.

Canada (Attorney General) v. Canada (Canadian Human Rights Commission), 2003 FTC 89 [2003] F.C.J. No. 117.

M. Leslie. "Boys Will Be Girls: Sex Reassignment Surgery and the Ethics of State Funding" (2004) 13 *Dalhouse J. Legal Studies* 239-260.

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See Also: Public	<i>Funding</i>	for Cli	inic Abo	rtion Se	ervices i	n Canada
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J.N. Erdman. "In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada" 56(4) (2007) *Emory L.J.* 1093-1155.

Association pour l'accès à l'avortement c. Québec (Procureur général), [2006] J.Q. no 8654

Jane Doe 1 v. Manitoba, [2005] M.J. No. 335.

Doe et al. v. The Government of Manitoba, [2004] M.J. No. 45.

7. Service Accessibility (October 17)

A. Access to Legal Abortion

R.J. Cook & S. Howard. "Accommodating Women's Differences under the Women's Anti-Discrimination Convention" (2007) 56(4) *Emory L.J.* 1039-1091, pp. 1055-1070

Family Planning Association of Northern Ireland v Minister For Health Social Services and Public Safety [2004] NICA 39 (Court of Appeal).

Tysiac v. Poland (European Ct of Human Rights), Application No. 186 5410/03.

R v. Morgentaler, [1988] 1 S.C.R. 30.

See also:

R. Duggal. "The Political Economy of Abortion in India: Cost and Expenditure Patterns" *Reproductive Health Matters* 12(24 Supp):130-137.

C. Ngwena. "Access to Legal Abortion: Developments in Africa from a Reproductive and Sexual Health Rights Perspective. (2004) 19 South African Journal of Public Law 328-350.

B. Access to Emergency Obstetric Care including Essential Medicines

Green Book: 22-25, 160-162 (Essential Obstetric Care) GB

A.D. Weeks, C. Fiala & P. Safar. "Misoprostol and the debate over off-label drug use." (2005) 112 BJOG: International Journal of Obstetrics and Gynaecology 269-272.

PART 4: EQUALITY & NON-DISCRIMINATION

	yping as Discrimination: Sex/Gender (October 24) ecturer: Simone Cusack (RSH Law Fellow)	
A. General	Principles	
	Green Book: 196-209 (Non-discrimination); 469-477 (CEDAW Gen Rec. 24).	GB
B. Stereoty	ping as Discrimination: Sex/Gender	
	S.R. Moreau, "The Wrongs of Unequal Treatment" (2004) 54(3) <i>U.T.L.J.</i> 291 –326, pp. 294-303.	205
	R.J. Cook & S. Howard. "Accommodating Women's Differences under the Women's Anti-Discrimination Convention" (2007) 56(4) <i>Emory L.J.</i> 1039-1091, pp. 1042-1051; 1075-1078.	210
	Gonzales v. Carhart, 550 U.S (2007): Syllabus at 1-7; Thomas J (concurring opinion) at 28-30; Ginsburg J (dissenting opinion; joined by Stevens and Breyer JJ) at 13-18.	217
	President of the Republic of South Africa v. Hugo, 1997 4 (SA) 1 at (S. Afr. S.C.), 1997 6 B.C.L.R. 708 at paras. 1-4; 32-43; 46-48; 52-53; 63-64; 74-87; 93-94; 105-106; 108-115.	233
See also:	CEDAW, General Recommendation No. 25: Temporary Special Measures, UN Doc. A/59/38 (2004), online: http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html R. Siegal, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection" (1992) Stan L. Rev. 261.	

9. Stigmatization as Discrimination: Health Status (October 31)

A. General Principles

S. Burris, "Disease Stigma in Public Health Law and Research" (2002) 253 30 J. L. Med. & Ethics 179-190.

B. Infertility

Cameron v. Nova Scotia (1999), 177 D.L.R. (4th) 611 (N.S. COA).	265
Evans v United Kingdom (2006) 43 EHRR 21 (European Court of HR) See also: Evans v. Amicus Healthcare Ltd. [2004] E.W.C.A Civ. 727	279
See also:	
A. Bharadwaj, "Why Adoption is not an Option in India: The Visibility of Infertility, the Secrecy of Donor Insemination, and Other Cultural Complexities" (2003) 56 Social Science & Medicine 1867-1880.	
A.O. Runganga, et al. "Culture, Identity and Reproductive Failure in Zimbabwe." (2001) 4(3) Sexualities 315-332.	
C. HIV/AIDS	
M. Maluwa, P. Aggleton & R. Parker. "HIV-and AIDS-Related Stigma, Discrimination, and Human Rights" (2002) 6 Health & Human Rights 1-18.	288
"India: Supreme Court denies right to marry for people living with HIV, then resiles from this conclusion" Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV. 21-26 (Geneva: Canadian HIV/AIDS Legal Network and UNAIDS, 2006).	298
Mr. X v. Hospital Z, (1998) 8 SCC 296 varied 2002 (SC India)	304
PART 5: DIGNITY, BODILY INTEGRITY & LIBERTY	
10. Bodily Integrity: Sterilization (November 14)	
A. General Principles	
Green Book: 109-115 (Review: Free and Informed Decision-Making) 315-22 (Involuntary Female Sterilization).	GB
B. Sterilization: Consent & Coercion	
Green Book: 128-134 (Review: Competent Delivery of Services)	GB
Zimmer v. Ringrose (1981), 124 D.L.R. (3rd.) 215.	306

Green Book: 16-17, 30 (medical aspects), 305-314 (case study).

GB

	A.S. v. Hungary (UN CEDAW; Hungary, Aug. 2006)	311
C. Steriliza	tion: Parens Patriae & Best Interests	
	Green Book: 118-119.	GB
	Re Eve (1986) 31 D.L.R. (4th) 1 (S.C.C.).	318
	C.M. Olesen, "Eve and the Forbidden Fruit: Reflections on a Feminist Methodology" (1994) 3 Dalhousie J. of Legal Studies 231-240.	324
See also:	Muir v. Alberta (1996) 132 D.L.R. (4th) 695 (Alta. Q.B.)	
See also: N	Male and Female Circumcision (Genital Cutting)	
	Green Book: 262-275 (Case Study: Female Genital Cutting)	
	Dedicated Issue: Male Circumcision & HIV Prevention Reproductive Health Matters (2007) 15(29).	
	M.D.A. Freeman. "A child's right to circumcision" (1999) 83(1) British Journal of Urology 74-78.	
	e and Other Inhuman & Degrading Treatment: Forced Pregnancy & Intimaches (November 21)	<u>ate</u>
A. General		
	Green Book: 170-175.	GB
B. Forced	Pregnancy	
	Green Book: 352	GB
	K.L. v. Peru, Comm. No. 1153/2003: Peru. 22/11/2005, UN Doc. CCPR/C/85/D/1153/2003 (2005)	329
C. Intimate	Body Searches	
	S. Long. "When doctors torture: the anus and the state in Egypt and beyond" (2004) 7(2) Health and Human Rights 114-140.	336
	F. Scorgie, "Virginity Testing and the Politics of Sexual Responsibility: Implications for AIDS Intervention" (2002) 61(1) African Studies 55-75.	350

12. Sexual Violence, Vulnerability & Empowerment (November 28)

A. Sexu	al Viol	ence
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A. Miller. "Sexuality, violence against women, and human rights:	361
women make demands and ladies get protection." (2004) 7(2) Health	
and Human Rights 16-47.	

See also:

CEDAW, General Recommendation No. 19: Violence against Women (GB)

S.H. Mayhew & C. Watts. "Global rhetoric and individual realities: linking violence against women and reproductive health." in K. Lee, S. Fustukian, and K. Buse (eds.) *Health policy in a globalising world*. (Cambridge: Cambridge University Press, 2002).

B. Access to Care: Emergency Contraception and Post-Exposure Prophylaxis (PEP)

Green Book: 287-297 (Sexual Assault and Emergency Contraception). GB

M. Richter. "Pepping up the public healthcare system for rape survivors: AIDS activism and advocacy." (2004) 60 Agenda 47-54.

Human Rights Watch Deadly Delay: South Africa's Efforts to Prevent
HIV in Survivors of Sexual Violence. (New York: Human Rights
Watch, 2004).

See also:

S. Smugar et al. "Informed Consent for Emergency Contraception; Variability in Hospital Care of Rape Victims" (2003) 90 Am J of Public Health 1372-6.

C. Empowerment in the Female Condom

A. Kaler, "It's some kind of women's empowerment": the ambiguity of the female condom as a marker of female empowerment" (2001) 52 Social Science and Medicine 783-796.

See also:

C. Pradhan. "Measuring Empowerment: A methodological approach" 46(2) *Development* (2003) 51-57.

H. Amaro. "On the margin: Power and women's HIV risk reduction strategies." (2000) 42 Sex Roles 723-749.

PART 6: MORAL, PROFESSIONAL & LEGAL DUTIES

13. The Right to Life & Conscientious Objection (December 5)

A. Prenatal Right to Life

J. Cook & B.M. Dickens. "Human Rights Dynamics of Abortion Law	410
Reform" (2003) 25(1) Human Rights Quarterly 1-59, pp. 22-29.	

Tremblay v. Daigle (1989) 62 D.L.R. (4th) 634 (S.C.C.) (Headnote). 414

Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.), 415 [1997] 3 S.C.R. 925.

Vo v. France, Eur. Ct. H.R. Application No. 53924/00, 8/VII/04 (2004). 428

See also:

Christian Lawyers Association of South Africa and Others v. Minister of Health and Others, [1998] (1) BCLR 1434 (T); [1999] (3) LRC 203

R. v. Sullivan, [1991] 1 S.C.R. 489

Portal del Belen – Asociación sin Fines de Lucro c/Ministerio de Salud y Accion Social de la Nacion s/ amparo, 5 Mar. 2002, Recurso de Amparo, p.709 XXXVI (Supreme Court of Argentina)

Barbara Hewson, "Dancing on the Head of a Pin?" Foetal Life and the European Convention" (2005) 13 Feminist Legal Studies 363-375.

B. Right to Conscientious Objection

Green Book: 139-142.

FIGO Committee for the Study of Ethical Aspects of Human Reproduction and Women's Health. Ethical Guidelines on Conscientious Objection (2005).

Pichon and Sajous v. France, App. No. 49853/99, Eur. Court H.R. 438 (2001) (European Court of Human Rights)

See also:

R.J. Cook & B.M. Dickens. "The Scope and Limits of Conscientious Objection" (2000) 71 Int J Gynaecol Obstet. 71-77.

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ORGANIZATIONS OF INTEREST

Action Canada for Population and Development

http://www.acpd.ca

AIDS Law Project, South Africa

http://www.alp.org.za/

Asian-Pacific Resource & Research Centre for Women (ARROW)

http://www.arrow.org.my/

ASTRA Network

http://www.astra.org.pl/

ATHENA (Advancing Gender Equity and Human Rights in the global response to HIV/AIDS)

http://www.athenanetwork.org/

Canadian HIV/AIDS Legal Network

http://www.aidslaw.ca/

Canadian Women's Health Network

http://www.cwhn.ca

Center for Reproductive Rights

http://www.crlp.org/

Centre for Health and Gender Equity

(CHANGE)

http://www.genderhealth.org

EQUINET (Southern African Regional

Network on Equity in Health)

http://www.equinetafrica.org/

Guttmacher Institute

http://www.guttmacher.org/

Family Care International

http://www.familycareintl.org/

Development Alternatives with Women for

a New Era (DAWN)

http://www.dawnorg.org/

Human Rights Watch, Women's Rights

Division

http://hrw.org/women/

International People's Health Council

http://www.iphcglobal.org/index.htm

International Women's Health Coalition

www.iwhc.org

Kaiser Network Organization

www.kaisernetwork.org

Latin American and Caribbean Committee

for the Defense of Women's Rights

(CLADEM)

http://www.cladem.org

People's Health Movement (PHM)

http://www.phmovement.org

Women's Global Network for Reproductive

Rights

http://www.wgnrr.org/

Women's Link Worldwide

http://www.womenslinkworldwide.org

Youth Coalition

http://www.youthcoalition.org

